



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 20, 1995

Ms. Marina Henderson
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711-2357

OR95-1515

Dear Ms. Henderson:

Your predecessor asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29671.

The Texas Health and Human Services Commission (the "commission") has received a request for information regarding a recent catalogue purchase for an Integrated Client Database Network System. Specifically, the requestor seeks

1. Original Proposal, including project cost, submitted by EDS;
2. Best and Final Proposal, including project cost, submitted by EDS;
3. Any other clarification documents submitted by EDS;
4. Final contract negotiated with EDS;
5. State's Proposal Review Team evaluation documents for each proposal which support the calculation of the Final Evaluation Scores

Your predecessor submitted items 1-4 for our review. As the commission has not submitted item 5, we assume that you have released the information.

The third party submitting the proposal, Electronic Data Systems, Inc. ("EDS"), objects to the release of items 1-4, claiming they are excepted from disclosure under sections 552.104 and 552.110. Pursuant to section 552.305(c), your predecessor declined to submit reasons for withholding the documents. Thus, we will evaluate the arguments submitted by EDS.

Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." Section 552.104 is designed to protect the interests of the governmental body as in a competitive bidding situation for a contract or benefit. Open Records Decision No. 592 (1991) at 8. It is not designed to protect the interests of private parties submitting information to a governmental body. *Id.* at 8-9. Therefore, you may not withhold the requested documents pursuant to section 552.104.

Section 552.110 excepts "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757 (1939). *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). A trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). The governmental body or the company whose records are at issue must make a *prima facie* case for exception as a trade secret under section 552.110. *See* Open Records Decision No. 552 (1990) at 5.¹

EDS asserts that several categories of information, including its technical solution, customer information, personnel information, and cost information, are excepted from disclosure as trade secrets. EDS states that the company makes substantial efforts to maintain the secrecy of this information. Access is limited to employees on a "need to

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, *supra*; *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

know” basis; EDS vigorously defends its technical responses against requests for disclosure in any state; information is not revealed to those outside of the company; and company policies exist to prevent disclosure of trade secret information by employees. Additionally, it appears that most of the information could not easily be acquired or duplicated by others without considerable amounts of effort and expense for development which EDS has invested. We conclude that EDS has made its prima facie case that most of the information it wishes to withhold is excepted from disclosure as a trade secret under section 552.110, with the following exceptions.

EDS submitted a redacted copy of its proposal for this office to review. EDS does not object to release of the contract and Exhibits A and B. Furthermore, EDS states that the “sections of the proposal which are protected from disclosure have been removed.” The commission has submitted a copy of the complete proposal. After comparing the two versions, we generally agree with EDS’s markings regarding the information it wishes to withhold as trade secret information under section 552.110.

With regard to corporate and personnel information, EDS submitted documents that were marked to withhold employee names and qualifications, vendor qualifications, and customer references. However, organizational and personnel information, qualifications, and experience are not generally excepted from disclosure as trade secrets. Open Records Decision No. 306 (1982). EDS was informed that employee names and resumes are subject to disclosure in Open Records Decision No. 175 (1977). Therefore, this information must be released as described below.

EDS marked information regarding names and qualifications of subcontractors but did not specifically address this type of information in its brief to this office. We assume that this information is claimed to be excepted under the same grounds as employee and corporate information. We find no grounds under which to withhold the information, primarily because there is a legitimate public interest in knowing the qualifications of those granted government contracts. See Open Records Decision No. 309 (1982). Therefore, this information must be released.

EDS claims that information concerning customers should be withheld because its release would give competitors an advantage by providing insight in procurement strategies and overall market strength. We assume that EDS claims that the customer information constitutes customer lists. However, customer lists are not always excepted from disclosure as trade secret information unless the entity wishing to withhold the information meet the six criteria outlined in the Restatement of Torts. Open Records Decision No. 494 (1988). In this case, EDS has not made its prima facie case by showing how the six criteria apply to the customer names. Therefore, you may not withhold the customer names.²

²EDS has marked portions of its proposal, specifically samples of various reports, to withhold the identity of the author of the report, the customer, and the dates on which the reports were either generated or reviewed. We do not believe any of the marked information may be withheld as a trade secret.

EDS also argues that its cost information in the proposal is a trade secret. We agree that some of the information regarding pricing methodology must be withheld under section 552.110. That section does not, however, generally except price lists from disclosure because this information does not meet the definition of a trade secret. The price lists are not "formula[e], pattern[s], [or] device[s]." RESTATEMENT OF TORTS § 757 cmt. b (1939). They may be a "compilation of information" but they are not "for continuous use in the operation of the business" but rather are information as to a single or ephemeral event in the conduct of the business -- costs for particular services or software in a specific proposal. *Id.* Therefore, much of the information on the software price lists are not protected from disclosure under section 552.110 as trade secrets. We have marked the information on these lists that you must withhold.

In addition, EDS withheld Exhibit F, which is incorporated into its contract with the commission and contains the actual costs of the services provided as well as a timetable for providing the services. We do not believe that this information is a trade secret for the reasons explained above. Moreover, except for the actual cost of the services provided, EDS has agreed to release much of the remaining information on the cost of the contract in other sections of the proposal. Therefore, the commission must release Exhibit F.

For your convenience, we have marked information that must be released on the copy of the redacted proposal submitted by EDS. For the sections of the proposal which were not provided by EDS that contain information that must be released, we have marked the copy of the proposal submitted by the commission. The following is a list of pages that contain information which EDS argued is a trade secret but this office has determined must be released:

1. Exhibit C, Table of Contents, page ii (regarding subcontractor identities) and xvi (under subheading "Cost Savings Opportunity"),
2. Exhibit C, Volume I, pages 6 - 8 (personnel information)
3. Exhibit C, Volume I, pages 35 - 42 (vendor qualifications, customer references)
4. Exhibit C, Volume I, pages 60 - 81 (subcontractor qualifications)
5. Exhibit C, Volume I, pages 83 - 85 (personnel information)
6. Exhibit C, Volume I, page 93 (organization chart)
7. Exhibit C, Volume I, pages 100-128 (personnel information)

8. Exhibit C, Volume III, samples of reports (author, customer, and date of report(s))
9. Exhibit C, Volume IV, pages 18-19 (regarding costs)
10. Exhibit D, document entitled "IDBN Hardware and Software" (release price list but withhold individual software titles)
11. Exhibit D, entire "IDBN Presentation"
12. Exhibit E, page 15 (organization chart)
13. Exhibit E, page 32 "IDBN Hardware and Software" (release price list but withhold individual software titles)
14. Exhibit F (costs and timetables)
15. Exhibit G

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/LMM/rho

Ref.: ID# 29671

Enclosures: Marked documents

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